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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the Matter of: **XPO CARTAGE, INC** Respondent-Employer, and **INTERNATIONAL BROTHERHOOD OF TEAMSTERS** Charging Party-Union.	**CASES 21-CA-150873** **21-CA-164483** **21-CA-175414** **21-CA-192602** **CHARGING PARTY'S POST-HEARING BRIEF AFTER REOPENING OF THE RECORD** **TO THE HONORABLE CHRISTINE E. DIBBLE**

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I. Introduction

In 1968, the Supreme Court affirmed that in order to determine whether individuals are employees or independent contractors under the National Labor Relations Act (the "Act"), the National Labor Relations Board (the "Board") is bound to apply the common law employee status test rooted in the ten non-exhaustive factors listed in the *Restatement Second of Agency*. Since then, the Board has applied this exact same employee status test, albeit with marginally different framing regarding exactly how the various pertinent facts must be analyzed. The Judge in the instant case—after analyzing all relevant facts regarding the working relationship—applied this common law test and definitively found that XPO's drivers are statutory employees under the Act.[1] After the Judge's decision, the Board did clarify one aspect of how this analysis should be conducted. Specifically, the Board stated that the question of whether individuals exercise true entrepreneurial opportunity should not be considered as a separate factor in the analysis. Instead, the Board stated that entrepreneurial opportunity—and its

[1] The Judge's 2018 decision in the underlying hearing will be cited herein as "ALJD." Transcripts from both the underlying hearing and the reopened record will cited as "Tr." Similarly, exhibits will be cited according to Party: "CP Exh.," "Resp. Exh.," "GC Exh.," and "Jt. Exh."

converse, a lack of employee control—must be viewed as a prism through which to analyze all of the other factors.

This pronouncement by the Board did not substantively change how the employee status test is applied because the exact same facts that were relevant before this change continued to be relevant after this change. Further, when analyzing entrepreneurial opportunity under its own separate factor, the component pieces of that analysis will lead to the exact same conclusion even if they are broken up and analyzed as part of the other common law factors. Here, the thirteen days of hearing in the first instance provided all parties more than sufficient opportunity to present all relevant evidence in their possession—the exact same evidence that is relevant under the reframed test—and the Judge properly considered all of this evidence in finding that, inter alia, drivers did not exercise significant entrepreneurial opportunity and that XPO unilaterally controlled key parts of the working relationship. During the reopening of the record, XPO failed to introduce any evidence that had not already been fully considered by the Judge, while the General Counsel and Union solicited and introduced evidence providing additional support for the Judge's initial determination of employee status. Thus, the Judge's analysis in the initial decision will apply equally to the reframed analysis set forth by the Board in *SuperShuttle*.

In fact, the case for a finding of employee status is so strong that even a cursory review of the relationship between the parties makes clear that these drivers are the exact types of workers the Act was intended to protect. XPO is a motor carrier who contracts with cargo owners to move loaded cargo containers on their behalf. XPO does not merely connect these cargo owners with fully independent motor carriers operating under their own operating authority, either individually or with their own employees. Instead, XPO itself takes responsibility for the cargo it is moving and signs contracts with the cargo owners as *its* customers, not customers of the drivers actually doing the move, and takes responsibility for that container throughout the move.

XPO then utilizes a group of drivers—many of whom have been working for XPO exclusively for years on end—to move those containers to and from its customer yards and railheads in Southern California. These drivers do not have or utilize their own operating authority and therefore only work under XPO's operating authority. Drivers have zero contact with the cargo owners/customers and do not negotiate any terms of that relationship. Drivers also do not negotiate their per-move rates, which are unilaterally set and promulgated on a take-it-or-leave it basis by XPO. Drivers must follow rules and requirements set by XPO—many of which are not a function of government regulation—and are subject to discipline, counseling, and eventual termination for failure to comply.

XPO dispatchers decide what assignments to give drivers and only give drivers one assignment at a time, rather than giving drivers free reign to chose between *all* available assignments and to take on as many assignments as possible at once so that they can make managerial decisions about how to organize those assignments for the day or the week. Drivers do not have set routes, nor do they have a proprietary interest in their routes or the customers that they service on a daily basis. Although drivers are theoretically allowed to reject assignments, this rarely—if ever—happens. Furthermore, XPO's dispatchers have a vested interest in ensuring that all assignments are completed lest XPO be forced to spend extra money or disappoint their customers—imperiling the dispatchers who failed to have that work get completed—giving credence to testimony by drivers that they fear retaliation if they do reject assignments.

Although some drivers now own their trucks or may obtain their trucks from other sources, XPO played a key role in helping drivers acquire those vehicles and it is not clear that drivers would have done so on their own. Similarly, although some drivers are registered as LLCs, this registration is nothing more than a sham perpetuated by XPO, who incentivized drivers who would otherwise never have registered LLCs to do so,. There is no evidence that the majority of drivers who register LLCs actually do anything with their LLC other than get paid in its name. Along the same lines, although

some drivers may have second-seat drivers, this does not provide entrepreneurial opportunities because XPO must approve those drivers and XPO exercises direct control over the second-seat drivers.

In addition, although XPO will point to alleged freedoms given to employees that support an independent contractor finding, these freedoms are nothing more than illusory. By its very nature, trucking work—and drayage/intermodal work in particular—allows for employers to provide its employee drivers with some flexibility while still having a reliable workforce that it can count on to do its work. In many instances, the containers that must be delivered are fungible—XPO does not care which specific driver moves which container, as long as the container gets moved. Trucking also does not require employers to dictate specific routes that drivers must take or to have someone else in the truck to supervise the driver while he is making a delivery—there are only so many possible routes when you are going from fixed railheads to customer locations.

Instead, XPO exercises indirect control by setting up a system that lines up its own business and economic interests with the economic interest of its drivers, paying what is essentially a piece rate based on the number of containers moved by the driver. XPO makes more money the more containers its drivers move, and piece-rate compensation also ensures that drivers have an incentives to accept as many containers as possible and to work as fast as

possible—just as with piece-rate employees across the country whose employee status is not in question. This, coupled with a workforce that has been working for XPO exclusively for an extended period of time, makes it easy for XPO to give drivers some flexibility.

XPO can allow drivers to reject some assignments because there is more likely than not another driver who will do that assignment. In the rare instances when that is not the case, the dispatchers can apply pressure on drivers to take the assignments or retaliate against them without there being a record of that interaction (and long term drivers are fully ware this is a possibility). XPO can allow drivers to decide when to work—as drivers work exclusively for XPO, XPO knows that most of them will try to work as much as possible and will show up when the most assignments are available, helping XPO's bottom line. As there is no wage an hour liability for XPO as a virtue of its misclassification of drivers, there is no penalty to XPO if too many drivers show up at once because XPO will get all its work done and will not have to compensate drivers who do not get work. Those drivers are also then likely to stick around and wait until they do get an assignment—because they work exclusively for XPO—giving XPO its cake and allowing it to eat it too.

This limited freedom that IBT offers its drivers does not make these drivers independent contractors. It just makes them employees who, like any

other employees, try to find ways to make more money—either by working faster if they are getting paid piece-meal, or by working more hours if they are getting paid hourly. But they are not doing so in service of their own enterprise, they are doing it in service of XPO's core business in order to merely make a living. While there are differences in compensation between drivers, these differences are not attributable to real managerial decisions—they are merely a function of how much or how fast drivers work, either in their own vehicles or in vehicles owned by other drivers. XPO then funnels money for second-seat drivers through first-seat drivers to make it appear that those first-seat drivers are making additional money, all the while both second-seat and first-seat drivers must operate under XPO's control and direction.

For these reasons, and as further described below, Charging Party respectfully requests that the Judge affirm her initial finding that drivers are employees under the Act.

II. Argument

A. *SuperShuttle* Did Not Significantly Change the Board's Common Law Employee Status Test

In determining whether an individual is an employee or an independent contractor, the Board examines the totality of the circumstances using a non-exhaustive, multi-factor, common-law test grounded in the

Restatement (Second) of Agency, Section 220 (1958). *See NLRB v. United Insurance Co. ("United Insurance")*, 390 U.S. 254, 256-259 (1968). These non-exhaustive factors include:

> 1. the extent of control which, by the agreement, the master may exercise over the details of the work.
>
> 2. whether or not the one employed is engaged in a distinct occupation or business.
>
> 3. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> 4. the skill required in the particular occupation;
>
> 5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
>
> 6. the length of time for which the person is employed.
>
> 7. the method of payment, whether by the time or by the job.
>
> 8. whether or not the work is a part of the regular business of the employer.
>
> 9. whether or not the parties believe they are creating the relation of master and servant.
>
> 10. whether the principal is or is not in the business.
>
> *Restatement (Second) of Agency,* Section 220.

The Board places the burden of proving this status on the party seeking to exclude the workers from the Act—in this case XPO—and narrowly interprets this exclusion to ensure that it is not used as a way to exclude individuals who the Act was designed to protect. *Holly Farms Corp. v. NLRB*,

517 U.S. 392, 399 (1996)); *Sisters Camelot*, 363 NLRB No. 13, slip. op. at 2 (Sept. 25, 2015); *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Supreme Court has made clear that under the common law test "there is no shorthand formula or magic phrase" establishing employee status. *United Insurance,* 390 U.S. at 258. Instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *Id.* .

In applying the common law test, the Board has long considered the "potential for entrepreneurial profit" on the part of the putative contractor in determining employee status. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019), Slip op. at 10 ("The Board has long considered entrepreneurial opportunity as part of its independent-contractor analysis."); *Roadway Package System, Inc. ("Roadway")*, 326 NLRB 842 (1998). For several years, under *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014), this question of entrepreneurial opportunity was analyzed as an independent factor in the test. In its 2019 *SuperShuttle* decision, however, the Board overruled *FedEx* "to the extent the FedEx decision revised or altered the Board's independent contractor test," making clear that "the traditional common-law test that the Board applied prior to FedEx" continues to be the appropriate test. *SuperShuttle*, 367 N.L.R.B. No. 75, Slip op. at 1.

In other words, *SuperShuttle* eliminates the separate factor which considered entrepreneurial opportunity directly, instead finding that entrepreneurial opportunity, "like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id.* The majority in SuperShuttle noted "we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case" but instead, "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate" *Id.*

The test used by the Board prior to *FedEx*, which *SuperShuttle* returned to, includes consideration of the practical impact of employer restrictions on a putative independent contractor's theoretical entrepreneurial opportunity. *See, Roadway*, 288 N.L.R.B. at 198 (rejecting Regional Director's finding that "efficiency of operation and ability to minimize costs" constitutes entrepreneurial opportunity because "the Employer establishes and regulates most matters essential to the drivers' livelihood . . . [controlling] the number of packages and stops, assignment of service areas, cost of service, and compensation."); *Corporate Express Delivery Systems*, 332 N.L.R.B. 1522, 1522 (2000), enf. 292 F.3d 777 (D.C. Cir. 2002) (no opportunity for entrepreneurial gain or loss where employer determined

routes, base pay and amount of freight for each route and did not allow drivers to add or reject customers); *Slay Transportation Co.*, 331 N.L.R.B. 1292, 1294 (2000) (no entrepreneurial opportunity where employer controlled drivers rates of compensation and prices charged customers). *Supershuttle* did not overrule this nuance in the analysis of entrepreneurial opportunity—it simply clarified that this analysis should permeate the common law factors rather than being viewed as a single factor. *SuperShuttle*, supra at 9.

As further described below, applying this prism to the instant case, with all attendant context, leaves no question that the majority of factors continue to support a finding of employee status and that XPO's drivers do not have actual and significant entrepreneurial opportunity.

B. The *SuperShuttle* Interpretation of the Common Law Test Proves that XPO's Drivers are Statutory Employees

1. XPO's Control, Which Limits Entrepreneurial Opportunity, Is Even More Pervasive than the Judge Previously Found

In *SuperShuttle*, the Board explained that "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative." *Id.* The Judge in the instant case, although issuing her decision before *SuperShuttle*, recognized this exact interplay between control and entrepreneurial opportunity when she explained that "Many of the factors considered in

determining whether the employer or worker exercises control over their work also applies to entrepreneurial opportunity." ALJD at 22. In other words, the Judge *already* utilized the prism of entrepreneurial opportunity when she analyzed this factor, and Respondent did not introduce any evidence that in any way contradicts the Judge's clear finding that XPO "maintained significant control over the drivers' work," ALJD at 14, which is one of the reasons that "drivers do not have a significant entrepreneurial opportunity for gain or loss." ALJD at 24.

In particular, the Judge found that XPO exercises control over:

> virtually all aspects of the company's interaction with the clients; the drivers' compensation for deliveries and other services; scheduling of the drivers deliveries; the types of equipment drivers must use for deliveries; the type of insurance drivers must maintain pursuant to their contract with the Respondent; requirement that the trucks are branded in the Respondent's name when delivering for its clients; and the standardization of the contract between the drivers and the Respondent.

ALJD at 14. XPO did not present any evidence contradicting these factual findings. Instead, the evidence introduced at the reopening actually reinforced these conclusions. Vice President of Transportation Tibbets confirmed that drivers are offered wages on a take it or leave it basis. Tr. 2224-2225. Regional Safety Manager Enrique Flores also provided extensive testified about XPO control that did not enter the record in the underlying hearing: XPO tracks drivers conduct through their CSA score and roadside

inspections, and that XPO will provide counseling and remedial training when drivers are not performing to XPO's standard. *See generally* Tr. 2351-2412. For at least a portion of the relevant time period in this case, XPO would impose fines on drivers who failed roadside inspections even though those fines were not required under federal law. Tr. 2373. XPO went as far as formalizing its discipline rules and decided to terminate any driver who did not respond to their counselling and training, accumulating 75-points on their CSA score. Tr. 2422-2423. This 75-point threshold was not set or imposed by federal law, it was imposed solely by XPO. Tr. 2423. These extensive and uncontradicted instances of control are a marked departure from *SuperShuttle*, where franchisees were "free from control by SuperShuttle in most significant respects in the day-to-day performance of their work." *SuperShuttle*, slip. op at 17.

Although XPO will place heavy weight on the fact that drivers have some leeway to chose when to work and how much to work, claiming that this equates to entrepreneurial opportunity and makes the drivers independent contractors, the caselaw does not support such a finding. In *Intermodal Bridge Transport*, another recent case involving drayage/intermodal drivers applying the *SuperShuttle* standard, drivers were also free to choose what days to work and what time to start, and are allowed to choose between several different assignments when they do show up to work. *Intermodal*

Bridge Transport, 369 NLRB No. 37, slip. op at 3 (2020). This limited freedom, however, was eclipsed by the control exercised by the employer's dispatchers because they controlled the assignments offered to drivers and they controlled drivers' interactions with customers. *Id.*

The same is true here. The freedoms cited by Respondent—that drivers can choose when to work and how long to work or that drivers can reject assignments—do not result in real entrepreneurial opportunity because "the Employer establishes and regulates most matters essential to the drivers' livelihood" including compensation and the assignment of services areas, packages, and routes. *Roadway*, 288 N.L.R.B. at 198. . Here, dispatchers control what assignments are offered to drivers, the appointments for the assignments given to drivers, the amounts that drivers are paid for those assignments, and various other aspects of drivers' work. Charging Party believes that the Judge did not properly credit drivers' testimony regarding possible retaliation. With a workforce that has been working exclusively for one employer for years—such as XPO's workforce—many work rules and expectations become unspoken norms. While drivers may have the ability to sometimes reject assignments, there is often little difference between the actual compensation for different assignments and it is very likely that dispatchers could pressure drivers not to reject assignments that need to get

done. Fearing retaliation, drivers will comply and do whatever is offered to them.

The only thing that XPO continually points to is the alleged range of compensation between different drivers. But a mere difference in compensation is not indicative of entrepreneurial opportunity. XPO's exclusive control over wages and countless other aspects of the working relationship means that the differences in compensation are merely a result of drivers working more hour or more efficiently, which is not a measure of entrepreneurial opportunity. *See Intermodal Bridge Transp.*, 369 NLRB No. 37 . As described below, even when truck owners have second-seat drivers on their trucks, those second seat drivers are completely controlled by XPO and there has been no showing that drivers make significant managerial decisions regarding those employees except whether to have one. And while a truck owners check will likely be double if they have a second-seat driver—the "compensation" ranges that XPO continually points to—this is merely XPO bundling payments for two drivers in one paycheck. There has been no showing that the truck owners actually make anything more than a de minimis amount from having a second-seat driver once the expenses that XPO illegally passes on to them are taken into account. Thus, there is no evidence that drivers exercise any level of control which would give them

actual entrepreneurial opportunity and this factor continues to support a finding of employee status.

2. XPO's Drivers Are Not Engaged in a Distinct Business or Occupation; The Work in Question is a Regular Part of XPO's Business; and XPO is in the Business

Three of the common law factors (2, 8, and 10, above) look at the same thing—whether there is a functional difference between the work that the principal and the agent do, and whether the agent does that work as an independent business or merely as a cog in the Employer's machine. Here, as the Judge found, XPO's drivers are not engaged in a distinct business or occupation and the work they do is a part of XPO's regular business because "drivers are an essential part of the company's business operations" and "Respondent could not perform its functions without the drivers." ALJD at 16-17. Similarly, "despite the additional drayage related services the Respondent performed, there was no substantive distinction between its core businesses and the function of the drivers." ALJD at 22.

Even after *SuperShuttle*, the Board has reaffirmed that this is the appropriate analysis for these factors. *See Velox Express, Inc.*, 368 NLRB No. 61 (Aug. 29, 2019) ("Velox is in the business of providing courier services, and the drivers are fully integrated into Velox's normal operations and perform a function that is not merely a regular part of Velox's business but is at the

very core of its business.") (internal citations omitted). *Nolan Enterprises, Inc.*, 370 NLRB No. 2 (July 31, 2020) ("The judge also correctly found that the dancers are not engaged in a distinct occupation or business and are not rendering services as an independent business."); *Intermodal Bridge Transp.*, 369 NLRB No. 37 ("The judge also correctly found that the drivers are not engaged in a distinct occupation or business and are not rendering services as an independent business, and their work is part of the regular business of the Respondent."). XPO failed to introduce any evidence challenging this finding, either in the underlying hearing or during the reopening. Despite this, Respondent will no doubt reassert their argument from the underlying hearing, that drivers do operate their own businesses because they have LLCs, can have multiple trucks or second seat drivers, and that their work is not at the core of XPO's business because XPO functions as a broker.

To begin, XPO's argument regarding brokerage are unavailing. The Federal Motor Carrier Association requires a separate broker operating authority, which XPO has not introduced into evidence, and brokers do "not assume responsibility for the property" they transport, unlike XPO. *See* Federal Motor Carrier Safety Administration, "Types of Operating Authority" (last accessed Dec. 12, 2020) *available at* https://www.fmcsa.dot.gov/registration/types-operating-authority. Further, brokers work with *authorized motor carriers*, and none of XPO's drivers have

their own motor carrier operating authority. *Id.* Thus, the Judge should reject the brokerage argument outright.

On top of that, any possible entrepreneurial opportunity that could arise from drivers having registered LLCs is eliminated by various factors. First, there is no evidence in the record that any of XPO's drivers have their own operating authority or insurance, which would allow them to function independent of XPO, regardless of their LLC status. Second, XPO admitted that it incentivized employees to register LLCs by providing them up front money that would cover the cost of registering, continuing financial assistance through a reduction in the insurance price XPO deducts from drivers' wages, and access to professionals to help them complete this process. CP. Exh. 4; Tr. 2423-2429. Any worker presented with this essentially free money would take the opportunity and would register an LLC, even if they had no idea what that entailed and even if they had no plans to operate as an actual independent business. This is reflected in the fact that there is no documentary or otherwise credible evidence in the record that any drivers have worked for multiple companies utilizing their LLCs. To the contrary, every driver who has testified has testified that during the relevant time period they *only* worked for XPO, making any alleged entrepreneurial opportunity merely illusory and theoretical. Further, even if there was extensive evidence of drivers working for other companies, this

would not be real entrepreneurial opportunity because drivers, like the dancers in *Nolan*, "are reliant on Respondent for customers" and their ability to do outside work "does not establish that they are a distinct business, as they would be equally reliant on that other [companies] in the same way they are on Respondent." *Nolan Enterprises*, 370 NLRB No. 2 .

The same is true of XPO's claims that drivers operate distinct businesses because they can obtain multiple trucks or hire second seat drivers. Any significant of these facts is erased by multiple facts. First, there is minimal evidence that drivers regularly utilized second seat drivers. Second, even for those drivers who did utilize second seat drivers, XPO maintained control over that relationship. A truck owner who wanted to use a second seat driver could not go out on his own and hire a driver to complete the work that XPO assigns the truck owner. Instead, the truck owner must have the second-seat driver apply directly with XPO and XPO exercises its discretion to decide whether or not to approve that second seat driver.

Once it approves a second seat driver, XPO exercises pervasive control over that second-seat driver as described above—XPO's dispatchers exclusively assign work to the second-seat drivers and there is no evidence that any truck owner personally dispatched second-seat drivers at its own discretion. Second-seat drivers are subject to the discipline described above to the same extent as first-seat drivers/truck owners, and XPO can thus decide

to terminate their contract even without the truck owners'/first seat drivers' permission. While truck owners can theoretically decide how much to pay second-seat drivers, this amount is directly constrained by the fact that XPO unilaterally controls the rates paid to the truck owner for the work done by the second-seat drivers, and also controls the amount that is deducted from employees paychecks for things like insurance. When these deductions—and maintenance expenses that XPO unlawfully passed on to drivers—are taken into account, drivers have a very narrow range within which they can pay their second-seat drivers. In other words, truck owners with second-seat drivers do not actually exercise managerial control over their second seat drivers, they merely provide an extra layer of liability protection between XPO and the second-seat drivers it also employs. Exactly what XPO wanted when it set up this structure.

Taken together, all of this means that drivers do operate as independent businesses and do not exercise significant entrepreneurial opportunity. Drivers cannot go out and find their own customers without being tied to some motor carrier, and drivers do not make managerial decisions that significantly impact their earnings. Those managerial decisions such as how much to pay drivers and what assignment to offer drivers are made by XPO, and the only thing that drivers can do is decide to work more or work harder or more efficiently or for additional entities that

control them and which provide them the authority they need to operate. This does not make drivers an independent business and the Judge should find that these factors continue to support a finding of employee status.

3. XPO Indirectly Supervises and Evaluates Driver Performance

One of the few factors that the Judge found supported independent contractor status was the supervision factor. Although the Judge correctly found that the nature of the job itself makes direct supervision unnecessary, the Judge's finding that this factor supported independent contractor status relied on the fact that "[t]he record is also devoid of evidence that the drivers receive evaluations, audits, or trainings." ALJD at 17. As described above, however, Enrique Flores testified extensively about XPO conducting reviews of drivers' performance metrics, counseling and training resulting from violations of such, and eventual discipline and termination resulting from a failure by drivers to comply with XPO's rules and requirements. Even if XPO uses different names or attempts to characterize these actions differently, there is no question that the process Mr. Flores described is direct evidence of the type of direction and supervision that indicates employee status. Thus, the Judge should reverse her finding on this factor and conclude that this factor provides even further support for a finding of employee status.

4. Drivers' Skills Are Indicative of Employee Status

The Judge also found that drivers' level of skill weighed in favor of independent contractor status. The Board in *Intermodal Bridge Transport*, however, provided a more nuanced interpretation of this factor. Although recognizing that "driving a commercial truck requires specialized skills," the Board found that this factor did not support a finding of independent contractor status because "the drivers' skills are inherent to the performance of the drivers' duties in furtherance of the employer's business, consistent with the common-law definition of an employee." *Intermodal Bridge Transp.*, 369 NLRB No. 37. Those drivers performed the exact same drayage/intermodal work that XPO's drivers perform, and the Judge should therefore find that drivers' skill is consistent with employee status and does not weigh in favor of independent contractor status.

5. Although Drivers Now Supply The Trucks They Use, XPO Supplies the Majority of Other Instrumentalities that Allow Drivers to Operate

SuperShuttle requires that the Judge reconsider her finding that this factor weights in favor of independent contractor status. The Judge reached determination that during the relevant period provided the tractor used to work for XPO and other minor instrumentalities,[2] while XPO provided the

[2] The Judge, however, failed to account for the fact that XPO was intimately involved in this process initially because it itself purchased these

also critical chassis and a host of other instrumentalities. When these facts are placed into the context of entrepreneurial opportunity, however, it becomes clear that mere ownership of the truck is insufficient to make XPO's drivers independent contractors. One key instrumentality that the Judge did not consider is the state and federal operating authority that motor carriers are required to have in order to operate (DOT and CA numbers). Here, every driver who testified utilizes XPO's operating authority and there is no documentary evidence in the record that any driver moved containers for XPO utilizing their own operating authority, or that they even had their own operating authority during the operative time period. This means that XPO provided this instrumentality to drivers.

More importantly, this means that drivers, even if they own their truck, do not actually have the ability to go out and operate on their own independent of XPO. They cannot decide to contract directly with XPO's customers or to directly obtain additional work from XPO's customers. Similarly, there is no documentary evidence that drivers maintained their own insurance coverage which would have allowed them to independently

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vehicles initially in 2010 and then leased them out to drivers. Although this occurred outside the 10(b) period, this intimate involvement by an Employer can result in this factor favoring employee status even when drivers technically provide the vehicle. *See e.g. Roadway, 326 NLRB* at 844-45. Even without this, however, it is clear that in this case drivers' ownership of a vehicle does not indicate entrepreneurial opportunity.

move containers for other companies or customers independently of XPO. That is why there is zero evidence documentary evidence of drivers working for other companies simultaneously, and an XPO agent testified that over six years he could only think of one driver who worked for another company simultaneously. This means that ownership of the truck does not give XPO drivers entrepreneurial opportunity outside of XPO, and internally XPO controls all key decisions that directly impact driver's income (as described above). Thus, as in *Velox*, the ability to use a vehicle for other work "does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of [the individual's] work." *Velox*, 368 NLRB slip op. at 4.

Here, drivers can use the trucks to work for XPO under XPO's control, or they can use the trucks to work for other companies under the control of those other companies. This resembles an employee who can choose to work for one company or to work for another company or to work for two companies, not a businessman exercising entrepreneurial opportunity. The Judge should therefore find that this factor weighs in favor of employee status.

6. Drivers Have Long Term Working Relationships with XPO

The Judge correctly found that drivers "were retained for an indefinite period and not on a job-to-job basis," and most drivers who testified had

worked for XPO for at least two years. ALJD at 19. Once again, XPO did not introduce any evidence that would change this conclusion. This mirrors the drivers who were found to be employees in *Intermodal Bridge Transport*, where the long tenure of 80% of the drivers "suggest[s] that the drivers function as a permanent work force" and therefore supports employee status. *Intermodal Bridge Transp.*, 369 NLRB No. 37. This also mirrors the dancers in *Nolan* who, despite their fixed length contracts on paper, actually worked "between 1.5 and 4 years" or "on and off, for over 20 years," also indicating permanence and employee status. *Nolan Enterprises*, 370 NLRB No. 2 . Further, it is worth noting the ALJ's finding that an individual's "ability to work elsewhere, or in other lines of work, does not materially distinguish them from countless other workers, particularly those in the service sector, who perform the same work for multiple employers in order to make a living." *Id.* The exact same thing is true of XPO's drivers.

7. The Method of Payment Supports a Finding of Employee Status

The Judges analysis of this factor already fits squarely into the prism of entrepreneurial opportunity. The Judge found that drivers play virtually no role in setting their compensation and that "[t]he pay rates for deliveries, fuel surcharges, accessorial-related fees, hazardous material shipment premium, labor charges, chains/tie downs, wait times, and a host of other fees

are determined by the Respondent." ALJD at 19. This overarching control that XPO exercises over these rates "render meritless the Respondent's argument that because a small portion of drivers were able to negotiate a change in their compensation this favors independent contractor status for the drivers." *Id.* If anything, it is clear that XPO is the one that exercises significant entrepreneurial opportunity and managerial decision-making when it "negotiates with clients, without input from the drivers, over the rates it will charge the customers . . . [and] also decides unilaterally the formula to use for calculating the mileage rate paid to drivers." *Id.* Thus, after *SuperShuttle* the Judge's finding that the method of payment supports employee status is even strong because it is clear that drivers have zero entrepreneurial opportunity in this regard.

This conclusion is also bolstered by the Board's cases following *SuperShuttle*. In *Intermodal Bridge Transport*, like here, this factor superficially supported independent contractor status because "drivers are paid by the assignment, and they are issued a 1099 tax form, not a W-2." *Intermodal Bridge Transp.*, 369 NLRB No. 37. A deeper examination, however, revealed that "Respondent established both the drivers' rate of compensation and the costs of operation," as XPO does here, and the "only opportunity the drivers had to increase their compensation was to work more hours, [which] does not turn an employee into an independent contractor,

since it does not mean that they enjoy an opportunity for entrepreneurial gain." *Id.*

Nolan also highlights a critical aspect of method of compensation that is not addressed in the Judge's decision—the relationship between what XPO makes and the work performed by drivers. In *Nolan*, the club earned more revenue the more work that the dancers did. *Nolan Enterprises*, 370 NLRB No. 2). The Board contrasted this with *SuperShuttle*, where drivers only paid a fixed rate to the company no matter how much work the driver did. The fact that the club's revenue was tied to the dancer's work and income "militates against a finding of independent contractor status" because it gave the club more of a vested interest in the work and efficiency of the dancers. *Id.* The instant case is more similar to *Nolan* than to *SuperShuttle*. XPO's income does not come from a set fee paid by drivers. Instead, XPO's income is dependent on the amount of work that XPO's drivers perform because having drivers complete this work is the only way that XPO earns money. This is highly indicative of a traditional employee-employer relationship. When coupled with XPO's extensive control over compensation rates generally, it is clear that this factor supports employee status.

8. Drivers Did Not Believe they Were Creating an Independent Contractor Relationship

After an extensive discussion, the Judge found that this factor weighed in favor of employee status. ALJD at 22. Respondent offered no evidence on this point, and the Judge must therefore reach the same conclusion. It is also worth noting that a parties belief that they were creating an employee-employer relationship weights against that party exercising any significant entrepreneurial opportunity, and supports a finding that when drivers chose what hours to work or chose to work extra days they were doing so as employees who will take any opportunity to increase their pay, not as entrepreneurs exercising managerial decisions which create the opportunity for significant profit or loss.

III. Conclusion

From the outset, Charging Party has argued that a reopening of the record was unnecessary[3] because the record already clearly supported a finding of employee status under the Board's new standard in *SuperShuttle*. The hearing after reopening proved that this was correct—XPO did not introduced any new evidence that had not been extensively litigated and considered in the underlying decision, and the only substantive evidence that

[3] As did Respondent before it inexplicably changed its mind and argued the opposite of its initial decision.

entered there record provided further support for the Judge's initial decision. Perhaps because all practitioners and judges were well aware of the constant back and forth between the Board and the Federal Courts regarding exactly how entrepreneurial opportunity should be analyzed, both the Parties arguments and the Judge's initial decision placed a heavy emphasis on entrepreneurial opportunity and the Judge in particular analyzed entrepreneurial opportunity as the converse of control, as the Board required after *SuperShuttle*. When this detailed and considered analysis is coupled with a failure by XPO to significantly change the record at all, it becomes clear that even when explicitly looked at through the "prism" of entrepreneurial opportunity XPO's drivers continue to be statutory employees who are substantially controlled by XPO and who cannot and do not exercise significant entrepreneurial opportunity.

DATED: December 7, 2020

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S POST-HEARING BRIEF AFTER REOPENING OF THE RECORD** was submitted by e-filing to the Division of Judges on December 7, 2020.

The following parties were served with a copy of said document by electronic mail on December 7, 2020:

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